Foreign Service Grievance Board

Annual Report for the Year 2002

Message from The Chairman

Foreign Service Grievance Board

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I am pleased to transmit the Annual Report of the Foreign Service Grievance Board of the Department of State for calendar 2002. It is filed under the provisions of Section 1105(f) of the Foreign Service Act (22 U.S.C. 4135). While the information required by law to be included in the Annual Report focuses almost exclusively on workload statistics, I am providing some additional insight to give a clearer picture of current Board operations.

Last year I noted that the workload of the Board had tumbled. We had received but 49 grievances, a substantial slide from what had typically been filed. For calendar 2002, the workload increased about 15 percent for we received 57 grievances. At that it is still well below the level of a decade ago when the caseload was 100 or so annually, but a gentle increase remains entirely possible. The case input is out of our hands so that past workload statistics are not a reliable guide to the future.

Because of this slump in filings during 2001, the membership of the Board was sliced from 27 to 21. That latter figure is what has typically been the size of the membership for the past decade. At present, our membership includes 9 arbitrators and 12 retired foreign service officers. Grievances are handled in panels of three members: an arbitrator as chair of the panel and two retired foreign service members. For the upcoming year, three current members have indicated they do not desire to be reappointed for another two-year term. It is anticipated that new members will be added to bring the total to about 21. Infusion of new blood each year has proven at least desirable in the past if not critically important for continued smooth operation of the Board.

As far as case processing is concerned, it is noteworthy that in cases where the prevailing party seeks an award of attorney fees, novel issues continue to crop up. If the Board finds that a grievance is meritorious it is authorized to direct the agency to pay reasonable attorney fees to the grievant to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under section 7701(g) of Title 5, United States code. Our approach to attorney fee matters has been resoundingly approved by the Federal District Court in *Gregoire* _____.

An excellent staff of six headed by an Executive Secretary provides not only support to the Board but vital continuity. In that Board members serve only part-time, the support of the permanent staff gains increased significance. However calendar 2003 promises to be a more trying year where the permanent staff of the Grievance Board will be altered dramatically. Both Senior Advisors will retire this summer and the search for replacements has begun. Also, one of the Office Management Specialists will retire. We have no doubt but that a smooth transition can be made, even though there will be a learning curve.

The Grievance Board continues to convene, usually each quarter, a general meeting of all the members, including those located outside the Washington area. A raft of current issues are discussed and the membership has been well pleased with these meetings as the attendance discloses. Such meetings will continue to be schedule during calendar 2003 as we wrestle with newly emerging issues.

Not too many years ago the bulk of the grievance workload was comprised of challenges to employee evaluation reports. In these cases it is the grievant who must carry the burden of proof. In cases other than disciplinary actions the Foreign Service Act provides a three-step grievance procedure for dissatisfied employees, 22 C.F.R. § 4131-4140. Initially, an individual files a grievance with the agency. If the agency denies the grievance, the individual may seek review by the Board, 22 C.F.R. § 4134. finally, if the Grievance Board denies the grievance, and aggrieved party may obtain judicial review of the FSGB's final decision in a United States District Court which reviews that decision under the standards of the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

Now, however, the number of in disciplinary actions being brought against a member is creeping up steadily. In these, the agency bringing the action against the member has the burden of proof. In the disciplinary action cases, oral hearings are at times held, whereas in the performance cases hearings are quite rare.

Even though appeals of our decisions seeking judicial review are not common, the Federal Courts continue to emphasize how they are highly deferential to our decisions. This concept serves as a stark reminder that what we decide has substantial impact on the personnel management system of the Foreign Service, and indeed, on individual members. That awareness fuels the care and attention given each matter.

Sincerely,

Edward J. Reidy
March 3, 2003

Board Members, Executive Secretary and Staff

Under Section 1105 of the Foreign Service Act of 1980, as amended (the Act), Congress established the Foreign Service Grievance Board, which consists of no fewer than 5 members who are independent, distinguished citizens of the United States. Well known for their integrity, they are not employees of the foreign affairs agencies or members of the Service. Each member -- as well as the Chairman -- is appointed by the Secretary of State for a term of two years, subject to renewal. Appointments are made from nominees approved in writing by the agencies served by the Board and the exclusive representative for each such agency. The Chairman may select one member as a deputy who, in the absence of the Chairman, may assume the duties and responsibilities of that position. The Chairman also selects an Executive Secretary, who is responsible to the Board through the Chairman.

As of December 31, 2002, Edward J. Reidy was the Chairman of the Board and he selected Edward A. Dragon as Deputy. Don Cooke was Executive Secretary.

Members of the Board for 2002

James E. Blanford	Victor B. Olason
Garber A. Davidson	Edward J. Reidy (Chairman)
Barbara C. Deinhardt	John H. Rouse
Edward A.Dragon (Deputy Chairman)	Jeanne L. Schulz
Jake M. Dyefs	Gail P. Scott
Charles Feigenbaum	Barry E. Shapiro
Margery F. Gootnick	Paul G. Streb
Lois C. Hochhauser	John C. Truesdale
Theodore Horoschak	Keith L. Wauchope
Warren R. King	Richard H. Williams
Lawrence B. Lesser	

Also of December 31, 2002, the Board had two Senior Advisors, Barnett Chessin and Donna Anderson. The Support Staff consisted of Conchita M. Spriggs, F. Elena Cahoon, and Lena Steinhoff. Unless the workload increases, that staffing seems adequate to meet the needs of the Board.

Structure of The Board

The Act which created the Grievance Board was designed to revamp the personnel system within the Foreign Service just as the Civil Service Reform Act (Pub. L. No. 95-454, 92 Stat. 1111 (1978)) aimed to accomplish improvements for the Civil Service personnel system. Congress established this Board to assume an appellate adjudicatory function except in disciplinary and separation for cause proceedings where it has original jurisdiction. Consonant with the objectives of the Foreign Service Act to ensure procedural protections for Foreign Service employees, the Grievance Board must resolve the tensions which sometimes develop between the need to protect employee rights and the desire to enhance Foreign Service efficiency.

The Board operates from a single location, State Annex 15, in Rosslyn, Virginia. Although it may conduct hearings abroad, it was not necessary to do so in 2002. Most, yet not all, grievances are adjudicated on a record without an oral hearing. The Board may operate as a whole, through panels, or individual members designated by the Chairman. Currently, the Board functions almost exclusively through panels of three members.

The Secretary of State may remove a Grievance Board member for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform, established at a hearing; no such action has been required in the history of the Grievance Board.

The Chairman has delegated to the Executive Secretary the authority to assign cases to the members for decision. Cases are assigned to panels according to complexity and consistent with the experience, availability, and workload of each member. This system has proven responsive to the needs of all and will continue to be followed. No member is ever assigned a grievance where the assignment may even appear to create a conflict of interest.

The Board obtains facilities, services, and supplies through the administrative services of the Office of the Secretary of State. Expenses of the Grievance Board are paid out of funds appropriated to the Department of State. Necessary support has been willingly and fully provided. Cooperation has been excellent.

Records of the Grievance Board are maintained in-house by the Board and kept separate from all other records of the Department under appropriate safeguards to preserve confidentiality of the grievant. The Board is charged with making every effort, to the extent practicable, to preserve the confidentiality of the grievant or the charged employee in matters brought before it. This requirement is closely adhered to.

Structure of The Board

Based on its statutory authority, the Grievance Board has issued regulations concerning its procedures. These regulations are set out at 22 CFR § 901 et seq.

Jurisdiction

The Board's jurisdiction extends to any grievance, as defined in section 1101 of the Act, and to any separation for cause proceeding initiated pursuant to section 610(a)(2). In determining what is grievable, the legislative history makes clear that this Board is to avoid a narrow interpretation of its jurisdiction. That policy prevails when close questions of jurisdiction are encountered.

While the Act grants broad jurisdiction for grievances of current members, former members have limited grievance rights. A former member, or surviving member of the family of a former member of the Service, may file a grievance only with respect to an alleged denial of an allowance, premium pay, or other financial benefit. Grievances from former members are infrequent.

Most often questions as to jurisdiction are handled at the very outset, for if the Board lacks jurisdiction, it has no power to act. Jurisdictional issues recur regularly. Although the workforce of the Foreign Service agencies consists of a blend of Civil Service and Foreign Service employees, the jurisdiction of the Grievance Board is limited to current and former members of the Foreign Service. Civil Service employees may have recourse to the Merit Systems Protection Board.

The Board has jurisdiction with respect to Labor-Management implementation disputes under FSA §1014. These disputes have been uncommon. None were submitted to the Board under this provision in 2002. In addition, the Board hears appeals of claims of overpayment of Foreign Service retirement annuities under 22 CFR Part 17 and certain appeals under the Foreign Service Pension System as specified in FSA §859. Grievances under these latter two provisions have been rare.

Board Decision-Making

The principal function of the Board is to provide a forum for the fair review and adjudication of grievance appeals. Its primary responsibility in satisfying that function is to interpret and apply the Act. Many decisions involve the application of our regulations and the interpretation of agency regulations, policies, and procedures known as the Foreign Affairs Manual. In processing grievances, the Board recognizes the need to accommodate the many employees appearing without legal counsel or other representation. Oftentimes they obtain assistance from the American Foreign Service Association (AFSA). Able assistance from AFSA is welcome because that often accelerates case processing while providing the grievant professional help. Regulations and precedent establish the procedural bases for practice before the Board. Federal Court decisions do, of course, have a dramatic impact on Board law. Our decisions are made available to the public, but in excised form, thereby preserving employee confidentiality.

Remedies

The remedial power of the Grievance Board is broad. It may, in general, direct the agency to take any corrective action deemed appropriate provided it is not contrary to law or a collective bargaining agreement. See 22 CFR § 908.1. The Board may also award reasonable attorney fees if the grievant is the prevailing party and if warranted in the interest of justice. See 22 C.F.R. § 908.

Research Capability and Computerization

The Grievance Board has now instituted its own web site: www.fsgb.gov. This now provides state of the art techniques for research. We continue to try to improve this capability.

Judicial Review

Final actions of the Grievance Board are reviewable in the District Courts of the United States. Whenever a court reviews a Board decision, the standards of the Administrative Procedure Act, as set forth in Chapter 7 of Title 5, United States Code, apply. Under the Foreign Service Act, 22 U.S.C. § 4140(a):

> Any aggrieved party may obtain judicial review of a final action of the Board on any grievance in the district courts of the United States . . . if the request for judicial review is filed not later than 180 days after the final action.

The significant issues resolved in judicial decisions rendered in 2002 are summarized below:

Toy v. United States, Civil Action 00-0929 (July 30, 2002)

Foreign Service member Steven M. Toy was an Administrative Officer with the Department of State who supervised a General Services Officer at a post abroad in 1995 and 1996. From the very outset the two had a difficult and contentious relationship. So much so that this working relationship constituted the majority of the negative comments in Toy's Employee Evaluation Report covering that time frame. Toy grieved these comments as falsely prejudicial against him because they place on him the lion's share of the blame for the strained relationship. Ultimately this poor relationship reached the point where Toy's tour was curtailed. Because they were clearly harmful to him, Toy grieved, asking that those comments be stricken from his evaluation.

In deciding Toy's grievance this Board denied all relief in a decision dated March 10, 1998. Toy appealed to the United States District Court. In a Memorandum Opinion and Order dated December 7, 2000 the Court granted in part and denied in part Toy's motion for judgment on the pleadings. It also remanded the case to us for more specific findings of fact coupled with a full and clear articulation of the reasons for our decision.

In a Decision on Remand, dated June 14, 2001, this Board expanded its reasoning and again denied all relief. Toy returned to court and this decision being summarized is the result of that action. Upholding our decision on remand, the Court ruled that the necessary finding of fact and explanation of its conclusion had been achieved by the Board. At the same time it held we have properly considered and explained our application of precedent. Perhaps most importantly, the Court stated that in reviewing a Grievance Board decision, it is "highly deferential" and noted that here the grievant had the burden of proof under 22 C.F.R. §905.1(a).

In denying the grievance this Board rejected the notion that there is a hard and fast rule that it is always the subordinate's responsibility to adjust to the subordinate's superior (or vice versa). We held that it is the "totality of the circumstances" that determines who will bear responsibility for a failed working relationship. The Court agreed with our analysis.

In keeping with precedent another important finding of the Court was its recognition that "As finder of fact . . . the FSGB has the authority to find one witness more credible than another . . . ." As is often the case in matters coming before us there had been probative evidence on both sides of the question of blame.

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Bloch v. Powell, Civil Action No. 98-0301 (RMU) Decided August 8, 2002.

Bloch was accused by the Department of State of engaging in questionable activities involving national security. Based thereon the Department suspended him without pay and issued and instituted action proposing his removal from the Foreign Service. Prior to the removal action being taken, Bloch tendered his resignation and submitted an application for retirement. The Department, in reply, informed Bloch that it was considering his resignation. Later it removed him from the service as a national security risk under 5 U.S.C. § 7532, finding credible and persuasive evidence supported the charges against him.

Ultimately the Department denied Bloch's retirement application saying it "declined to consent" to his voluntary retirement. Later Bloch submitted an application for a refund of his mandatory retirement contributions and the Department made a refund. Even though he had filed for, and received the refund, Bloch later challenged the agency denial of his retirement. We affirmed the agency action but when Bloch went to the District Court the Court remanded the matter to us holding that our decision was arbitrary and capricious.

On remand we again ruled against Bloch, finding, inter alia, that Bloch was not entitled to an annuity upon his resignation, because the Secretary had not given consent to his retirement, a requirement of 22 U.S.C. § 4051.

In its Memorandum Opinion on Remand the Court made a number of rulings of importance to the Grievance Board. In what appears to be a matter of first impression the Court held that because the Department had serious national security concerns about Bloch it had legitimate and rational grounds to justify withholding of consent to an immediate annuity even though Bloch met the age and service requirements.

When Bloch filed an application to obtain a refund of his mandatory retirement contributions he used a form OF-138 which provides that "an election to receive a lump-sum payment cannot be changed once it becomes final" and informs the applicant that: "if you have five or more years of Federal civilian service you may be entitled to an annuity which will be forfeited by payment of this refund." That said, the Court found that Bloch knowingly and voluntarily waived his right to his pension once he elected to withdraw his pension contribution.

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The United States Court of Appeals for the Federal Circuit in *Egan v. Merit Systems Protection Board,* 2002 U.S. App. Lexis 7081 (April 4, 2002) found that Egan was barred from pursuing this appeal based on the concept of election of remedies, Egan was an employee of the United States Agency for International Development who had previously elected to use the grievance appeal provided for by that agency. When he was unsuccessful, he filed an appeal to this Board which dismissed his appeal as untimely. The Court of Appeals found that Egan had freely elected the grievance procedure and that even though we did not rule on the merits of that claim he was nonetheless barred from trying another route. Having already made his election, he was not entitled to follow diverse routes to obtain relief.

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Ackerman v. United States, et al. Civil Action 01-01901 (HHK) United States District Court for the District of Columbia (decided October 29, 2002) involved a claim by Ackerman that he was wrongfully discharged from the Foreign Service for performance-related reasons. Ackerman asserted that a Grievance Board decision denying his grievance was procedurally and substantively flawed.

For the first decade of his foreign service career Ackerman received generally favorable reviews. Then, after about a year working in an extremely difficult and understaffed post abroad, he became noticeably temperamental, a

change Ackerman attributes to a nervous breakdown. When Ackerman became involved in a number of "abrasive" exchanges with a well-regarded Foreign Service National there resulted a series of heated discussions with senior officials at the post that culminated with Ackerman being asked not to return to work. He agreed, claiming he was too ill to work.

Ackerman did not return to work, and stopped accepting work assignments. At no time did Ackerman seek medical attention and, for the most part, used sick and annual leave to cover his absence. He also requested curtailment. His failure to accept work assignments was commented upon in his subsequent performance evaluation. A Departmental Board made a determination that Ackerman's performance was sub-par and this conclusion coupled with some prior weak evaluations led to his selection out of the service for failure to meet the standards of his class.

One argument made by Ackerman was the failure of the Department to arrange for proper medical treatment given the nature of his behavior in violation of 3 FAM 681.2a. His point was that because the evaluation was made on the performance of one suffering from mental illness it was inherently prejudicial. The Grievance Board held, and the Court agreed, Ackerman had not carried his burden on this issue. In upholding the Grievance Board on this issue the court noted that (1) Ackerman never sought medical assistance; (2) no medical diagnosis of mental illness was made; and (3) a psychiatrist, after speaking on the telephone with Ackerman, chose not to follow-up either with the embassy or Ackerman. Concluding that Ackerman made no convincing showing that Ackerman ever suffered from a mental illness during the tour in question, the court refused to fault the ambassador for failing to ensure Ackerman received psychological counseling because doing so would place an unwarranted burden on "Foreign Service Officers lacking any medical training, to diagnose and procure proper medical treatment for their colleagues."

The Court did not, however agree with the Grievance Board's conclusion that Ackerman had received the required periodic counseling that would have alerted him to his performance deficiencies and therefore enable him to take corrective action. While the Board recognized Ackerman did not receive formal counseling, it considered that at a small post appropriate feedback had been provided. The Court found this assumption unwarranted and, in error, because it was at odds with binding precedent holding that where the preponderant evidence did not show in advance that a grievant was informed directly or indirectly of a flaw in performance and had no opportunity to address and meet the criticism, an evaluation was unfair and prejudicial.

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Olson v. Powell et al., Case No. 99-2957 (GK) United States District Court for the District of Columbia decided October 16, 2002.

This grievant has filed both in Court and, at the Board, a number of grievances. Although this proceeding had a number of questions to resolve, this report draws attention to the narrow issue of the disputed date upon which Olson received notice of a decision by the Grievance Board. The question became important for that date was the starting point for computing the time in which a judicial review had to be filed.

The Court reaffirmed the often expressed strong presumption that mails, properly addressed, having fully prepaid postage and deposited in proper receptacles, will be received by the addressee in the ordinary course of the mails. And the Court ruled that Olson's argument that he did not receive a copy of the decision until several months after it was mailed was baseless. The Court noted that Olson had been out-of-the country and was obliged to check his post office box, or have someone else check it, while he was out of the country to ensure that he would receive any official mail which needed a timely response or follow-up (such as the filing of the present complaint).

Foreign Service Grievance Board Decisions

During calendar year 2002 a wide range of important cases were decided by the Board. Those having the most significance are summarized here in random order.

FSGB-Case No. 2001-047 (Decided April 30, 2002)

A disciplinary action where the employee was charged with a violation of 3 FAM 4138 (11) "Improper Personal Conduct." While on a Temporary Duty Assignment abroad grievant engaged in improper physical contact with certain employees of a local hotel and made inappropriate comments to them. The conduct generated complaints by the employees.

The governing regulation authorizes a penalty for an employee who engages in "Conduct which clearly shows poor judgment or lack of discretion which may reasonably affect an individual or the agency's ability to carry out its responsibilities or mission."

The misconduct here happened off-duty and away from the workplace. In our experience off-duty misconduct matters are less frequent than on duty but it is very important in off-duty cases that to sustain the charge the agency was obliged to show that there was a clear nexus between his off-duty misconduct and the employee's ability to carry out his responsibilities. The Board readily found this nexus in the forced departure of grievant from the country where the misconduct occurred. That departure showed a clear nexus between his misconduct and ability to carry out his responsibilities as part of the Secretary's detail. Moreover, considerable agency time and effort had to be expended in trying to avoid adverse local notoriety.

Over an objection by the charged employee that the accusers were not worthy of belief, the Board found otherwise, accepted their statements as substantial evidence, and explained why. This finding is helpful to the Board.

FSGB Case No. 2001-013 (June 18, 2002)

Grievant challenged the agency action in setting his entry step level in which he was initially employed. He considered he had been disadvantaged in comparison with other similarly situated and alleged that: (a) the Department violated published regulations and standard operating procedures in setting the level at which he was hired; and (b) that others hired along with him were granted higher entry salary step levels even though they had almost identical education and work experience as he did.

The Board denied the grievance noting that the Department had broad discretion in setting an employee's entry-level step level. Analyzing pertinent regulations the Board concluded the Department had acted properly and had not abused its discretion.

FSGB-Case No. 2001-037 (July 17, 2002)

From time-to-time grievants seek relief by alleging that they had not been adequately counseled during the rating period and thus had no opportunity to improve performance in areas where supervisors found them wanting. In this case the Board ruled against grievant but stated:

> While the Board would prefer the letter of the regulations be respected regarding the performance counseling requirement, it has ruled in many previous grievances appeals that, if the objectives of the counseling have been achieved, that the procedural error of failing to conduct formal counseling sessions . . . does not constitute a substantive error.

It found the initial intent of the regulation had been satisfied in that grievant knew his duties and was made aware by his rater of his performance weaknesses through oversight and close supervision.

FSGB Case No. 2002-015 (decided November 1, 2002) the Board dealt with a claim that a FP-05 Office Management Specialist was entitled to overtime pay under the provisions of the Fair Labor Standards Act (29 U.S.C. Sections 201-219). The claim was denied because the Board found ample evidence to support the agency contention she was "exempt" from Act and not entitled to its financial benefits. The essential basis for that conclusion was the holding grievant's work involved duties of substantial importance to the essential operation of the office as well as the Department's ability to carry out

its foreign affairs function. Her duties had supervisory and managerial overtones which placed her outside the coverage of the FLSA

In FSGB Case No. 2001-002 (March 4, 2002) grievant alleged that there were serious irregularities in the conduct of the 1999 Selection Board which considered him for promotion. One particular flaw was his assertion that a member of the Board "told him that he had been deprived of a promotion because the Office of the Secretary had directed that others be promoted ahead of him." Relying on Rule 26 of the Federal Rules of Civil Procedure, the Board ordered grievant to disclose the name of the informant. Grievant refused. Left with no basis that would support the serious allegations made, the Board denied the grievance noting that selection boards are entitled to a presumption of integrity.

In FSGB Case No. 2000-006 (decided February 6, 2002) the Department sought to discipline a Foreign Service Officer in a post abroad for having sold duty-free personal property and a duty-free personally owned motor vehicle to a local national not entitled to duty free privileges without first obtaining authority from the Embassy and the local ministry of foreign affairs. The Board upheld much of the charge, but because it did not uphold it totally, the Board remanded the matter to the agency solely for the purpose of allowing the Department to craft a penalty consistent with the charges sustained.

In FSGB Case No. 2000-042 (decided June 21, 2002) the Board reiterated the principle that in matters of discipline the Board will not normally displace the penalty imposed by the Department. However, it ruled here that the agency had not shown that it had hewed to the principle set forth in 3 FAM 4374(1) that "disciplinary action taken should be consistent with the precept of similar penalties for like offenses with mitigating or aggravating circumstances taken into account." Accordingly the Board set the penalty and explained why.

In FSGB Case No. 2002-016 (decided October 8, 2002) the grievant challenged both a low ranking given him by the 1999 Selection Board as well as an unsatisfactory performance evaluation he received for the 2001 rating cycle. The Board denied the grievance concerning the low ranking, but granted relief as to the unsatisfactory rating. The Board found that the unsatisfactory rating could not be upheld because: (a) required counseling about performance was untimely and thus of no value, and (b) the rating official failed to follow the requirements of the applicable regulation 3 FAH-1 H-2814.3. Not only must a member being given an unsatisfactory rating be advised of the areas of performance deemed inadequate but be given a reasonable opportunity to improve and be provided with adequate guidance on how to improve. Because the record was clear that the unsatisfactory rating was given without affording grievant the rights established in the regulation, it was set aside. This case emphasized that because an unsatisfactory rating

would be devastating to a career, support for such a designation must be in accordance with regulations.

FSGB Case No. 2001-007 (decided April 2, 2002) was a Separation for Cause proceeding brought by the Peace Corps. The charged employee, a foreign service FP-03, was serving with the Peace Corps under a temporary 30-month appointment and thus our jurisdiction was found. The member was charged with: (a) unacceptable conduct as a supervisor; (b) an inability to maintain a professional working relationship with his own supervisor; and (c) demonstrated inability to practice effective employee relations; and (d) misrepresentation and omissions in the member's application for employment

After some seven days of oral hearing the Board concluded the agency had carried its burden of proof in all respects and that separation from the foreign service was an appropriate penalty. Where the evidence was conflicting the Board found that presented by the agency worthy of belief.

In FSGB Case No. 2001-045 (decided July 2, 2002) the member was charged with poor judgment as well as a weapons violation. The charged employee was involved in a minor automobile accident where in evident anger, he brandished a pistol at the driver of the other car. The Board upheld the charges and found a five-day suspension reasonable.

In upholding the charges the Board rejected grievant's argument that he was unaware of applicable policy and should not be held accountable. The Board pointed out that grievant had "ignored the contents of the Post Report and Post Welcome Letter, failed to complete and submit his check-in sheet upon arrival . . . . " So he should have been aware.

In FSGB Case No. 2002-001 (December 23, 2002) Grievant sought attorney fees under Section 1107(b)(5) of the Foreign Service Act of 1980. Under the fee arrangement agreed upon grievant was charged a fixed fee to be augmented by a contingency fee arrangement applicable only if the grievance is found meritorious. Even though the grievance was indeed found meritorious we held that only the fixed fee was awardable because that was the full extent of the expenses "incurred" by the grievant the law limits recovery to those incurred by the grievant. In so finding we followed the precedent of the Merit Systems Protection Board that "no contingency enhancement may be awarded" under controlling law.

FSGB Case No. 2001-049 (May 20, 2002) Grievant, an employee of the U.S. Agency for International Development (USAID), sought payment of an educational allowance covering tuition for his daughter's enrollment in kindergarten at a location abroad. Both the Department of State and USAID maintained they lacked jurisdiction. The Board ruled USAID had jurisdiction and when that agency treated the grievance on its merits, USAID denied the

request on the grounds that the regulation relevant provided that only children who are five years of age on or before December 31 of the school year in question were eligible for this allowance and that grievant's daughter did not qualify. The provision relied upon by USAID to support its denial of the financial benefit sought had recently been charged to the disadvantage of grievant. Aware of this, grievant sought "grandfather rights" insisting he had filed his request prior to the change and thus should be accorded the more liberal prior interpretation. The Board found otherwise, holding that he had not filed "a completed" application form until the more restrictive regulation had taken effect.

In FSGB Case No. 2002-008 (decided August 26, 2002) the Board dealt with a grievance whereby the grievant, a Foreign Service career candidate, who was selected out, claimed that he was the subject of discrimination of the basis of national origin and age. Grievant had been born in a foreign country, immigrated to the United States as a child, is now a U.S. citizen and is over 40-years of age. The Board conceded that remarks made by grievant's rating officer about his national origin and age may have been inappropriate, we found that they did not suffice to satisfy grievant's burden of proof as to discrimination. Grievant presented no evidence that his age or national origin played any role in the deliberations of the Selection Board that recommended, or the Director General who decided, his selection out.

The significant holding in **FSGB Case No. 2002-029 (decided December 2, 2002)** was the Board's treatment of the matter of relative culpability in determining an appropriate penalty in a disciplinary action proceeding. The case was somewhat unique in the sense that as the result of a single incident, more than one individual failed to follow firearms safety regulations. A chain reaction developed. Grievant failed to properly prepare his weapon for shipment and when the weapon passed through various other hands they failed to examine it to ensure it was unloaded, assuming it was in that condition. His violation was found to be a more egregious offense than that of others because he had the initial responsibility to pack it unloaded.

In FSGB Case No. 2002-005 (decided April 2, 2002) the grievant insisted that he was disadvantaged at performance evaluation time because his duties could not be discussed in detail for the reason he was performing in a position of a highly classified nature. He added that this was a directed assignment for which he had no choice.

The Board recognized that no classified performance evaluations are prepared and that it was clear for reasons of national security neither rater nor reviewer could discuss work specifics in making the evaluation.

Even so, no harm was found because the Board noted that it was the quality of performance in a particular assignment, rather than the explicit

duties involved, which is the key factor in any evaluation. Because the rater and reviewer were able to describe the quality of grievant's work, including examples of skills and abilities, a fair and balanced evaluation could be, and was, achieved. The grievance was denied.

FSGB Case No. 2001-042 (decided February 8, 2002) involved a disciplinary action where the charged employee was suspended for three workdays based on the charge that grievant violated Departmental regulations and policies by receiving, storing and forwarding sexually explicit materials on his unclassified government computer.

What grievant had done was to receive and forward jokes and material which he agreed were inappropriate to the workplace to a select group of friends. He attempted to set his actions apart from those who themselves generate sexually explicit material, but the Board ruled that his actions were of such a nature that disciplinary action was justified.

The charged employee in a disciplinary action matter in **FSGB Case No. 2000-042 (decided June 21, 2002)** was charged with "carelessness on duty" after being involved in two single-car accidents involving government-owned vehicles in which he was the driver. The Department imposed a seven-workday suspension as a penalty. The misconduct was never in doubt as responsibility was admitted, but the charged employee challenged the length of the suspension insisting that it was not consistent with penalties imposed by the Department in similar cases.

In meeting this issue the Board noted the importance the Department had placed on ensuring that the imposition of discipline should be characterized by equity and consistency (3 FAM 4324.3a) and that any disciplinary action taken should be consistent with the precept of similar penalties for like offenses with mitigating or aggravating circumstances taken into consideration (3 FAM 4374(1)). Finding this concept an important consideration yet not adequately addressed by the Department, the Board gave it the opportunity to demonstrate that its penalty was consistent with that principle. The agency presented ""scant evidence or argument" on this point so the Board made its own analysis and found that a Letter of Reprimand was the maximum reasonable penalty.

We did not credit the argument that the matter of consistency of penalties was not reviewable by the Board because it was a matter related to the judgment of the deciding official.

Case Statistics 2002

A.	Number of Cases Filed	57
B.	Types of Cases Filed	
	EER	19
	Financial	8
	Disability	0
	Discipline	19
	Separation	6
	Jurisdiction	1
	Assignment	2
	Attorney Fees	0[1]
	Implementation	2
		57
C.	Disposition of 2001 Cases	
	Affirmed	12
	Reversed	4
	Partially Reversed	2
	Settled	3
	Withdrawn	4
	Dismissed	0
	Pending (as of 12/31/2001)	32
D.	Oral Hearings Duration: 1, 2 and 7 Days	
E.	Interim Relief	19

[1] **In early 2000, the Board changed the procedures for classifying cases. The Board no longer assigns new case numbers for attorney fee cases, but treats them as a continuation of the underlying grievance. In 2001, the Board issued 9 orders on attorney fees.**

F. All Cases Closed in 2002
(Including Prior Year Cases)

Total	61
Affirmed	39
Reversed	9
Partially Reversed	4
Settled	4
Withdrawn	5
Dismissed	0
	61

Pending